No. 89-1279

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,
vs.
CLEOPATRA HASLIP, CYNTHIA CRAIG,
ALMA M. CALHOUN and EDDIE HALGROVE,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

PETITION FOR WRIT OF CERTIORARI

Of Counsel:
VICKI W.W. LAI
ADAMS DUQUE & HAZELTINE
523 West Sixth Street
Los Angeles, California 90014
(213) 620-1240

BRUCE A. BECKMAN
Counsel of Record
ADAMS DUQUE & HAZELTINE
523 West Sixth Street
Los Angeles, California 90014
(213) 620-1240

OLLIE L. BLAN, Jr.
BERT S. NETTLES
SPAIN, GILLON, GROOMS, BLAN & NETTLES
2117 Second Avenue North
Birmingham, Alabama 35203
(205) 328-4100

J. MARK HART
SPAIN, GILLON, GROOMS, BLAN & NETTLES
2117 Second Avenue North
Birmingham, Alabama 35203
(205) 328-4100

Attorneys for Petitioner
Pacific Mutual Life Insurance Company

Lawyers Brief Service / Legal Printers / (213) 383-4457 / (714) 720-1510

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QUESTIONS PRESENTED

The following questions are presented by the Petition for Writ of Certiorari:

1. Whether Alabama Law, as applied below, violates Due Process by allowing the jury to award punitive damages as a matter of "moral discretion," without adequate standards as to the amount necessary to punish and deter and without a necessary relationship to the amount of actual harm caused.

2. Whether Alabama law violated Pacific Mutual's right to Due Process under the Fourteenth Amendment by allowing punitive damages to be awarded against it under a *respondeat superior* theory.

3. Whether the amount of punitive damages in this case was excessive, in violation of Pacific Mutual's Due Process right to be free of grossly excessive, disproportionate damages awards.

4. Whether the suit below, although nominally civil, must be considered criminal in nature as to the punitive damages awarded therein, entitling Pacific Mutual to protection under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

5. Whether Alabama law discriminates against those defendants subjected to open-ended punitive damages by limiting the amount of such damages which may be awarded against other classes of defendants, without rational basis.

6. Whether the constitutional defects in the award of punitive damages against Pacific Mutual were cured by judicial review and the potential for a remittur.

RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, petitioner Pacific Mutual Life Insurance Company states that it is a California mutual insurance company. It has no parent company, nonwholly owned subsidiary or affiliate.

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PETITION FOR WRIT OF CERTIORARI

Pacific Mutual Life Insurance Company ("Pacific Mutual") respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Alabama in this case.

OPINIONS BELOW

The opinion of the Jefferson County Circuit Court is unreported [App., *infra*, A1-A16]. The opinion of the Supreme Court of Alabama [App., *infra*, B1-B16] is reported as *Pacific Mutual Life Ins. Co. v. Cleopatra Haslip, et al.*, No. 87-482 (Sept. 15, 1989) (to be reported at 553 So.2d 537 (1989)).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1251(a).

The judgment of the Supreme Court of Alabama was entered on September 15, 1989. A timely petition for rehearing was denied on November 9, 1989 [App., *infra*, C1], and a petition for stay was denied on Dec. 6, 1989 [App., *infra*, D1]. On December 22, 1989 Justice Kennedy issued an order granting Pacific Mutual's application for stay, which was confirmed by the full Court on January 8, 1990. [App., *infra*, E1.]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part:

> "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life,

liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. The Sixth Amendment to the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district where the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with true witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the assistance of counsel for his defense.

The Fourteenth Amendment, Section 1 of the United States Constitution provides in relevant part:

> ". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

A. THE PARTIES

Petitioner is Pacific Mutual Life Insurance Company ("Pacific Mutual").

Respondents Cleopatra Haslip, Cynthia Craig, Alma Calhoun and Eddie Hargrove ("respondents") are employees of the City of Roosevelt ("the City") in the State of Alabama. Respondents were participants in an insurance plan sponsored by the City in which Pacific Mutual provided individual life insurance coverage.

B. THE ACTION BELOW

Respondents' action against Pacific Mutual involved a suit seeking punitive damages for the misconduct of one of Pacific Mutual's soliciting agents, Lemmie L. Ruffin, Jr. ("Mr. Ruffin"), who at the time of the alleged acts was acting on behalf of another company, Union Fidelity Life Insurance Company ("Union Fidelity") with respect to a health insurance policy issued by Union Fidelity, not Pacific Mutual.

1. The Complaint

On May 25, 1982 respondents filed their complaint against Pacific Mutual and Mr. Ruffin in the Jefferson County Circuit Court. The complaint claimed damages against Pacific Mutual and Mr. Ruffin for (1) fraud, (2) breach of contract and (3) "bad faith." [CT 4-11.][1] Mr. Ruffin and Pacific Mutual filed separate Answers. [CT 19, 21.] Later, counsel for Mr. Ruffin filed a Motion to Withdraw which was granted on June 21, 1984. From that time on Mr. Ruffin was not represented by counsel and did not appear at any subsequent proceedings, including the trial. [CT 24.]

Respondents' complaint was amended several times. [CT 12-14, 66-67.] Pacific Mutual filed timely answers to each amended complaint, raising additional defenses and broad based constitutional challenges to an award of punitive damages. [CT 199-205, 225.]

2. The Trial

At trial, the issue of fraud was submitted to the jury. Pacific Mutual was found vicariously liable for the acts committed by Mr. Ruffin. On August 7, 1987, the jury rendered a verdict for respondents in the amount of $1,077,978. [CT 342-43.] Pacific Mutual timely filed motions for a new

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[1] The Clerk's Transcript will hereinafter be designated as "CT." The Reporter's Transcript of the proceeding will hereinafter be designated as "RT."

trial or, alternatively, a judgment notwithstanding the verdict. The motions were denied by the trial court. [CT 344.]

3. Pacific Mutual's Appeal

Pacific Mutual appealed. [CT 345-350.] The matter was briefed, and argued on November 22, 1988. Post-argument letter briefs were submitted by both sides at the request of the court. *Pacific Mutual raised its constitutional challenges to an award of punitive damages at the answer stage, preserved such issues at trial and vigorously advanced those issues on appeal, in its briefs, at oral argument, in the post-trial letter briefs and in its petition for rehearing.*

4. The Decision of the Alabama Supreme Court

The Alabama Supreme Court filed its decision affirming the judgment below, and rejecting Pacific Mutual's federal constitutional challenges to the punitive damages award on September 15, 1989. [App., *infra*, B1-B16.] Two dissenting justices voted to vacate the punitive damages award on constitutional grounds.

5. Pacific Mutual's Petition for Rehearing

Pacific Mutual filed a timely petition for rehearing in the Alabama Supreme Court. The Alabama Supreme Court denied the petition by an order dated November 9, 1989. [App., *infra*, C1.]

C. STATEMENT OF FACTS

1. Respondents' Prior Coverage

Respondents are employees of the City of Roosevelt. The City allowed its employees to purchase a group health insurance policy through the municipality. A policy originally issued by Blue Cross/Blue Shield ("Blue Cross") was cancelled sometime before 1981. [RT 92.]

2. Mr. Ruffin's Solicitation

Sometime in 1981, Mr. Ruffin, who was then a soliciting agent for both Pacific Mutual and Union Fidelity, forwarded a

mail solicitation to the City asking if it was interested in discussing insurance. [RT 431.] The City stated it was. [*Id.*]

Mr. Ruffin later met with the City's mayor, city attorney and city clerk. [RT 131, 433.] Mr. Ruffin presented his Pacific Mutual business card and discussed the City's interest in obtaining health and life insurance. [RT 93, 96, 98-99, 429.]

3. Pacific Mutual Did Not Issue Group Health Policies

While Pacific Mutual issued individual life policies to City employees, it did not underwrite group health insurance policies for municipalities. [RT 429, 442.] Pacific Mutual did, however, allow its agents to broker business with other insurance companies. [RT 469.] Mr. Ruffin at that time was also a licensed agent of Union Fidelity. Union Fidelity, a separate and distinct company from Pacific Mutual, did issue group health insurance to municipalities. [RT 262-63.]

4. The Separate Applications to Union Fidelity and Pacific Mutual

Mr. Ruffin submitted a proposal to the City indicating he would place life insurance with Pacific Mutual and health insurance with Union Fidelity. [RT 219-20, 221, 283, 312-16, 335.] The City approved the proposals, and on August 19, 1981, Mr. Ruffin completed separate applications for the City and its employees for group health coverage with Union Fidelity and individual life policies with Pacific Mutual. [RT 219-21, 283, 312-16, 335.] Mr. Ruffin then submitted the City's application for health insurance to Union Fidelity. The City's application for life insurance was submitted to Pacific Mutual. Pacific Mutual and Union Fidelity are separate companies without any affiliation. [RT 262-60.]

5. Issuance of the Separate Health and Life Policies

Union Fidelity approved the health application and issued group health policy to the City effective September 1, 1981. [RT 255.] Union Fidelity later confirmed the health coverage by letter with the city clerk. [RT 138-139.] Pacific Mutual approved the applications for individual life insurance and

began issuing life insurance coverage to the City's employees. The premium checks for both the life and health insurance policies were collected by Mr. Ruffin. [RT 115-16, 141-42.]

6. Pacific Mutual's Agents' Contract Forbade Mr. Ruffin's Conduct

Mr. Ruffin arranged with Union Fidelity to have premiums and other notices for the group health insurance to be sent to him at his office in the Pacific Mutual branch office in Birmingham. This practice, as to Pacific Mutual, was forbidden under Mr. Ruffin's sales agent's contract with Pacific Mutual. [RT 841.] It appears that Mr. Ruffin failed to remit premiums received by him from the City to Union Fidelity, and Union Fidelity sent lapse notices to respondents through Mr. Ruffin, who did not forward them to respondents. [RT 724-25, 837.] Pacific Mutual's agent in charge of the Birmingham office, Patrick Lupia, was also licensed with Union Fidelity and other companies. There was testimony that Mr. Lupia was aware that Mr. Ruffin was having the Union Fidelity notices sent to him at the Pacific Mutual office. Mr. Lupia denied this, but the jury apparently disbelieved him. [RT 724-75].

7. Cancellation of Union Fidelity's Health Coverage

In the fall of 1981, the Union Fidelity health coverage for the City was cancelled. Shortly thereafter, Mr. Ruffin attempted to obtain replacement health insurance coverage for the City's employees. [RT 472-75, 478-79.] He submitted an application therefor to John Alden Company, apparently an independent insurance broker for Union Fidelity. [RT 455, 456, 479.] Mr. Ruffin's deposition testimony, which was read at trial, was that he continued to collect the health portion of the premiums so that he would have the premium money to submit to the replacement carrier. [RT 454.] An application for health insurance was submitted by Mr. Ruffin to John Alden. Mr. Ruffin received preliminary approval and was assigned a case number. [RT 455, 456-58.] However, before a policy was ever issued, respondent Cleopatra Haslip was hospitalized. [*Id.*]

8. Haslip's Hospitalization

Haslip was hospitalized for a kidney infection on January 23, 1982 before a replacement policy was ever issued. [RT 455, 456-58.] Haslip incurred $2,500 in hospital bills. Because the hospital could not confirm insurance coverage it required her to pay a cash sum toward her final bill upon her discharge. The hospital records for Haslip's hospitalization do not list Pacific Mutual as the insurer, but instead list another company, Commercial Insurance Company. A claim for the hospitalization was never filed with Pacific Mutual. [RT 235.]

Mr. Ruffin testified that Haslip called him after her discharge, angered about having to write a check to the hospital and demanded her premium payment back. [RT 458-60, 480.] With the deletion of Haslip, there were not enough participating employees for issuance of the replacement policy, so Union Fidelity issued a premium refund check to Mr. Ruffin, which he said he tendered to the city clerk. [RT 460.]

9. The Litigation

a. The Complaint

Respondents commenced this action on May 25, 1982 in the Jefferson Circuit Court alleging that Mr. Ruffin collected premiums but failed to remit them to the insurers so that respondents' coverage lapsed without their knowledge. The complaint claimed damages against Pacific Mutual and Mr. Ruffin for fraud, breach of contract and bad faith. [CT 4-11.] Union Fidelity was not named as a defendant. On June 22, 1982 respondents amended the complaint to add claims for the tort of outrage. Respondents later amended the complaint to further restate claims for fraud and conspiracy. [CT 66-67.] Pacific Mutual filed timely answers to each complaint raising affirmative defenses including constitutional challenges to an award of punitive damages. [CT 199-205, 225.]

b. The Trial

The case was submitted to the jury on respondents' fraud claims on both the health and life insurance policies against Pacific Mutual. The trial court charged the jury that it could impose liability for fraud on Pacific Mutual if Mr. Ruffin knew the representation was false or should have known it was false, suggesting an impermissible negligence standard. [RT 885-86.]

c. The Punitive Damage Jury Instructions

Following the trial court's charge on the issue of liability, the jury was instructed that once it determined there was liability for fraud, it could award punitive damages in its discretion. The court charged as follows:

> "Damages is a money award which the law says you should award the plaintiffs. One, to reasonably compensate that plaintiff for the loss that he sustained. Two, in the case of fraud, if you find fraud, you may at your discretion award what is known as punitive damages.
>
> * * *
>
> "Now, if you find that fraud was perpetrated then in addition to compensatory damages you may in your discretion, when I use the word discretion, I say you don't have to even find fraud, you wouldn't have to, but you may, the law says you may award an amount of money known as punitive damages.
>
> "This amount of money is awarded to the plaintiff but is not to compensate the plaintiff for any injury. It is to punish the defendant. Punitive means to punish or it is also called exemplary damages, which means to make an example. So, if you feel or not feel, but if you are reasonably satisfied from the evidence that the plaintiff, whatever plaintiff you are talking about, has had a fraud perpetrated upon them and as a direct result they were injured and in addition to compensatory damages you may in your discretion award punitive damages.
>
> "Should you award punitive damages, in fixing the amount, you must take into consideration the character and degree of the wrong as shown by the evidence and the necessity of preventing similar wrongs." [RT 895, 897-98.]

d. The Verdict

On August 7, 1987 the jury rendered a verdict in favor of each of the respondents and determined:

(i) Pacific Mutual was held liable for Mr. Ruffin's acts under the doctrine of *respondeat superior*. Mr. Ruffin was found to have been acting within the course and scope of his employment with Pacific Mutual when he committed the acts at issue in the instant suit;

(ii) Mr. Ruffin had not abandoned his agency relationship with Pacific Mutual; and

(iii) Mr. Ruffin acted fraudulently.

Pacific Mutual was fined over $1,000,000 for the acts committed by Mr. Ruffin on behalf of Union Fidelity. Respondents were awarded the following amounts:

Cleopatra Haslip	—	$1,040,000;[2]
Cynthia Craig	—	$12,400;
Alma Calhoun	—	$15,290;
Eddie Hargrove	—	$10,288.

[CT 342-43.]

Pacific Mutual timely filed a Motion for New Trial, or in the Alternative, Judgment Notwithstanding the Verdict, which was denied on December 11, 1987. [CT 344.]

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[2] Mrs. Haslip's claim was as to the Union Fidelity health insurance policy. Pacific Mutual was therefore fined on a *respondeat superior* basis with respect to insurance it did not issue.

e. Pacific Mutual's Appeal

Pacific Mutual raised a number of state law grounds of error, and raised each of the constitutional arguments regarding the award of punitive damages set forth in the Questions Presented section, above.

f. The Alabama Supreme Court Decision

The Alabama Supreme Court, in a 5 to 2 decision, upheld the award against Pacific Mutual, and filed its decision affirming the judgment below on September 15, 1989.

With respect to Pacific Mutual's constitutional challenges to the punitive damages award, the court held that:

(1) The Excessive Fines Clause of the Eighth Amendment does not apply to punitive damages awards in cases between private parties under *Browning-Ferris Industries Of Vermont v. Kelco Disposal, Inc.*; 492 U.S. __, 109 S.Ct. 2909 (1989);

(2) The Alabama Supreme Court had previously rejected the remaining constitutional arguments submitted by Pacific Mutual in past decisions;

(3) The guidelines previously adopted by the court to be used by trial courts in reviewing punitive damages awards requiring the trial judge to reflect on the record his or her reasons for either interfering or not interfering with a jury's verdict, provided sufficient guidelines and protections against improper jury awards. [App., *infra*, B1-B16.]

(4) **The Dissent**

Justice Maddox and Justice Steagall of the Alabama Supreme Court voted to vacate the punitive damages award, finding that the punitive damages award in this case violated the Due Process Clause of the Fourteenth Amendment. They also concluded that Alabama's judicial review processes did not cure the violation. [App., *infra*, B14-B16.]

g. Pacific Mutual's Petition for Rehearing

A timely petition for rehearing was filed by Pacific Mutual further addressing the constitutional validity of punitive damages, citing the concurrences in *Browning-Ferris*

Industries Of Vermont v. Kelco Disposal, Inc., 492 U.S. __, 109 S.Ct. 2909 (1989). The Alabama Supreme Court denied that petition by an order dated November 9, 1989. [App., *infra*, C1.]

REASONS FOR GRANTING THIS PETITION

Over approximately the past fifteen years, punitive damages have changed from a seldom-used remedy reserved for cases of intentional injury and actual malice, involving a strong element of outrageous behavior, to a commonplace part of virtually every tort action, products liability case (even those based upon strict liability), and in many breach of contract cases, based upon an allegation of "bad faith," tortious breach. Perhaps most perniciously, in these days of "Rambo litigation," punitive damages are frequently sought in "defensive" counter-claims raised in an effort to deprive plaintiffs of their day in court through the *in terrorem* effect of the cost of defense and the unpredictable, discretionary nature of these awards.

This explosion of punitive damages claims has (i) rapidly escalated both the number and the size of these awards, (ii) expanded the types of actions in which they are awarded, most notably into contract cases, and (iii) changed the criteria justifying such awards. The requirement of actual malicious, outrageous behavior with evil intent has been replaced by "conscious" or "reckless" disregard of the rights of others.

The situation has so changed that an advocate of such damages, if properly controlled, Professor Owen, in "*Punitive Damages in Products Liability Litigation*," 49 U.Chi.L.Rev. 1 (1982), wrote, concerning multimillion dollar awards, at page 6:

> "Such awards have become well accepted in principle, and my concern is now that large awards of this type are becoming almost common. . . . Large assessments of punitive damages may not yet be a major threat to the continued viability of most

> manufacturing concerns, *but the increasing number and size of such awards may fairly raise concern for the future stability of American industry.*" [Emphasis added.]

As shown by the award against Pacific Mutual in this case, juries, and reviewing trial and appellate courts, have free and untrammelled discretion regarding whether and how much to punish.

Justice Elkington, in *Rosener v. Sears, Roebuck & Co.*, 110 Cal.App.3d 740 (1980), *app. dism'd*, 450 U.S. 1051 (1981) stated this matter succinctly, at page 759:

> "Placing unrestricted power in a jury to direct punishment for "evil intent" by compelling the "evildoer" to pay money to another without right thereto, seems foreign to any concept of due process known to me."

Judicial oversight at present does no more than shift discretion to the judge or panel of judges. All of the "tests" for the validity of these awards boil down to the subjective determination of whether the particular court feels the award was excessive, based upon, as with jurors, their individual backgrounds, temperament and societal concerns.

While this Court has never determined whether or not the procedures involved in civil punitive damages cases satisfy Due Process requirements, it has banned punitive damages in a broad category of defamation cases [*Gertz v. Welch*, 418 U.S. 323, 350 (1974), *cert. denied*, 459 U.S. 1226 (1983)], banned punitive damages in union fair representation cases [*Electrical Workers v. Foust*, 442 U.S. 42, 53 (1979)], found ERISA pre-emption precluded punitive damages in self-funded employee benefit plans [*Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134 (1985)]; split 5-4 over the availability of such damages in actions under 42 U.S.C. Section 1983 (1976 Ed., Supp. IV) [*Smith v. Wade*, 461 U.S. 30 (1983)]; and expressed recognition of serious constitutional issues as to punitive damages in *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986); *Bankers Life & Casualty Co. v. Crenshaw*,

486 U.S. 71 (1988); and *Browning-Ferris Industries Of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. __, 109 S.Ct. 2909 (1989), but found that such issues had not been properly raised in those cases.

This is an appropriate case for this Court to examine the present state of punitive damages doctrine to determine whether Due Process standards are met, considering the free reign given to juries by that doctrine to punish selectively, to indulge bias, prejudice and any wealth redistribution inclinations they may have, and to exercise standardless discretion to render awards bearing no necessary relationship to actual harm caused.

I. ALABAMA LAW, AS HERE APPLIED, AND PUNITIVE DAMAGES DOCTRINE GENERALLY, VIOLATES DUE PROCESS BY ALLOWING THE JURY TO AWARD PUNITIVE DAMAGES AS A MATTER OF "MORAL DISCRETION," WITHOUT ADEQUATE STANDARDS AS TO THE AMOUNT NECESSARY TO PUNISH AND DETER AND WITHOUT A NECESSARY RELATIONSHIP TO THE AMOUNT OF ACTUAL HARM CAUSED

Punitive damages are clearly punishment. As such, they must be awarded under constitutionally adequate standards to guide juries and reviewing court as to when they should be imposed, and as to how much is appropriate to punish and deter [*Mathews v. Eldridge*, 424 U.S. 319, 334 (1976); *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971); *Kollender v. Lawson*, 461 U.S. 352, 358 (1983); *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988) (concurring opinion); *Browning-Ferris Industries Of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. __, 109 S.Ct. 2909 (1989)].

In the *Bankers Life & Casualty Co.*, and *Browning-Ferris* cases, above, the Court declined to rule on Due Process challenges to punitive damages because the issues were "not

pressed or passed upon below." Justice O'Connor, however, in a concurring opinion joined by Justice Scalia, while concluding the issues should not be reached in that case, stated at 486 U.S., at pages 87-88:

> "Mississippi law gives juries discretion to award any amount of punitive damages in any tort case in which a defendant acts with a certain mental state. In my view, because of the punitive character of such awards, there is reason to think that this may violate the Due Process Clause . . .
>
> "Punitive damages are not measured against actual injury, so there is no objective standard that limits their amount. Hence, 'the impact of these windfall recoveries is unpredictable and potentially substantial.'
>
> " . . . This grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process."

In *Browning-Ferris*, above, Justice Brennan, joined by Justice Marshall, stated, at 109 S.Ct. 2909 at page 2923:

> "I join the Court's opinion on the understanding that it leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private parties."

The jury (or trial court) process which appears to trouble the Court was described in *Devlin* v. *Kearny Mesa AMC/Jeep/ Renault, Inc.*, 155 Cal.App.3d 381 (1984), in which the Court stated, at page 388:

> "The process through which a fact finder finds punitive damages is somewhat contradictory. On the one hand, the court or jury must be sufficiently disturbed to conclude the defendant must be punished. On the other hand, although outraged, the fact finder cannot be vindictive. The channeling of just the correct quantum of bile to reach the correct

> level of punitive damages is, to put it mildly, an unscientific process complicated by personality differences. *Conduct which one person may view as outrageous another may accept without feeling, depending on such diverse characteristics as an individual's background, temperament and societal concerns.* The process is further complicated by the lack of objective criteria from either the Legislature or the courts as to 'how much' is necessary to punish and deter." (Emphasis added.)

This is exactly the arbitrary and discriminatory enforcement condemned by Due Process.

Because the decision of whether or not to award punitive damages is committed to the moral discretion of each jury, imposition of such punishment is necessarily arbitrary and unpredictable. *Devlin* recognized that what may outrage one jury, and lead it to award substantial punitive damages, may leave another jury unmoved.

The constitutional invalidity of this type of situation was described by this Court in *Coates v. City of Cincinnati*, 402 U.S. 611 (1971) as follows at page 614:

> "Many types of behavior can be restricted or even prohibited but not constitutionally, 'through the enactment and enforcement of an ordinance whose violation may entirely depend upon whether or not a [law enforcement officer] is annoyed.' "

[*See also, Jenkins v. Werger*, 564 F. Supp. 806, 808 (D. Wyo. 1983)].

Neither may juries be allowed to pursue their personal predilections. [*Kollender v. Lawson*, 461 U.S. 352, 358 (1983); *Smith v. Gaquen*, 415 U.S. 566, 575 (1974)].

Here, in an instruction typical in these cases, the jury was charged:

> "Should you award punitive damages, in fixing the amount, you must take into consideration the character and the degree of the wrong as shown by

the evidence and the necessity of preventing similar wrongs." [RT 898].

As stated by Justice Brennan regarding a very similar instruction, in *Browning-Ferris Industries Of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. __, 109 S.Ct. 2909 at page 2923:

> "[G]uidance like this is scarcely better than no guidance at all . . . The point is . . . that the instruction reveals a deeper flaw: the fact that punitive damages are imposed by juries guided by little more than an admonition to do what they think is best."

In this case, which again is typical, the jury was, as noted by Justice Brennan in *Browning-Ferris* [109 S.Ct. 2909 at page 2923, "left largely to [itself] in making this important, and potentially devastating, decision." Pacific Mutual's right to Due Process was violated by this unbridled jury discretion. The rights of other defendants in substantially identical situations of jury discretion have been violated in the past and are at risk in the future. Guidance from this Court is needed.

II. ALABAMA LAW VIOLATED PACIFIC MUTUAL'S RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT, BY ALLOWING PUNITIVE DAMAGES TO BE AWARDED AGAINST IT UNDER A *RESPONDEAT SUPERIOR* THEORY

Pacific Mutual was "punished" by an award in excess of $1 million because of the fraudulent conduct of its former soliciting agent, Lemmie Ruffin, where:

(1) Mr. Ruffin was at the time acting for Union Fidelity not Pacific Mutual;

(2) The health insurance policy at issue in respondents' suit was sought from and issued by Union Fidelity;

(3) Mr. Ruffin obtained Union Fidelity's agreement to send premium notices to Mr. Ruffin, not Pacific Mutual;

(4) Pacific Mutual never approved of such conduct;

(5) Pacific Mutual is a distinct and separate entity from Union Fidelity and had no control over Union Fidelity;

(6) Pacific Mutual was unaware of Mr. Ruffin's conduct and was given no opportunity to address the situation prior to the lawsuit.

It seems fundamental that before a corporation is fined over one million dollars, it should be shown to have done something wrong. That was not done here. As stated in the Order of the Trial Court dated December 11, 1987 [App., *infra*, A7], the evidence below of intentional fraud was evidence that Mr. Ruffin intentionally converted the premiums and, the Trial Court stated, this element of intent on Mr. Ruffin's part was the basis upon which plaintiffs below were awarded punitive damages against Pacific Mutual.

When punitive damages were imposed on Pacific Mutual on a *respondeat superior* basis, the focus for determination of the amount of the damages shifted from Mr. Ruffin to Pacific Mutual. It is self-evident that the jury would not have imposed a fine of over one million dollars on Mr. Ruffin. This factor contributed greatly to the fundamental unfairness, excessiveness and disproportionality of the fine imposed in this case, even though no wealth evidence was admitted.

A. *Respondeat Superior* Is Not a Constitutionally Permissible Basis for the Imposition of Punitive Damages

The settled law of Alabama applied by its Supreme Court in this case allowed punitive damages to be awarded against Pacific Mutual, as principal, for fraud by its purported sales agent, without any showing of authorization or ratification, and in fact, allows such liability even if, as here, the principal has forbidden the conduct [*Autrey v. Blue Cross & Blue Shield Of Alabama*, 481 So.2d 345 (Ala. 1985); *National States Ins. Co. v. Jones*, 393 So.2d 1361 (Ala. 1980)] and even though, as

in this case, the fraud was committed strictly for the agent's benefit [*Henderson v. Croom*, 403 F. Supp. 668 (N.D. Ala. 1975)].

Once the jury below found that Mr. Ruffin was acting within the scope of his role as a Pacific Mutual agent, Pacific Mutual became subject to vicarious liability for both the compensatory and punitive damages which would otherwise have been awardable against Mr. Ruffin.

The million dollar fine imposed upon Pacific Mutual for its sales agent's conduct is a punitive sanction imposed for someone else's unauthorized, unratified, and uncondoned wrongdoing. This constituted a violation of Due Process.

In *Lake Shore & Southern Michigan Railway Co. v. Prentice*, 147 U.S. 101 (1893), this Court held, in a diversity case, that a company could not be held liable for punitive damages for torts by employees unless it authorized or ratified the action.

The *Lake Shore* case has been followed, questioned and criticized but remains good law. In *American Society of M.E.'s v. Hydrolevel Corp.*, 456 U.S. 556 (1982), *Lake Shore* was questioned by way of *dictum* in a footnote. In *Hydrolevel*, the American Society of Mechanical Engineers ("ASME") had been subjected to an award of treble damages in an antitrust action, in which the jury had found that the improper actions had been ratified by ASME. ASME argued that it could not, under *Lake Shore*, be held liable for punitive damages on an apparent authority basis, although the jury had found ratification. The majority opinion stated that apparent authority was an appropriate basis for antitrust liability, given the purposes of that legislation.

Addressing the treble damages award, the majority found, at pages 574-75, a sufficient *non-punishment* purpose for such damages in antitrust cases to distinguish *Lake Shore*. Furthermore, the majority cited Restatement, Agency §217c, Comment C, for the proposition that the rule limiting a principal's liability for punitive damages does not apply to special

statutes giving treble damages. In a footnote, the majority stated that *Lake Shore* might have been decided against the then trend of cases, but merely distinguished the case in an antitrust context, but did not overrule it. The Chief Justice, and Justice Powell, joined by Justices Rehnquist and White, dissented on the ground that apparent authority was not a permissible basis for punitive damages, even in antitrust actions.

The *Lake Shore* opinion stated sound public policy. This was recognized in *McGuffie v. Transworld Drilling Co.*, 625 F.Supp. 369 (W.D. La. 1985), in which the Court reviewed the authorities in the area and concluded, at page 373:

> ". . . I do not find the policy arguments made [in favor of the Restatement rule] persuasive. Deterrence and punishment have been the traditional policy arguments in favor of imposing punitive damages.
>
> I agree with *McCormick* that 'there would seem to be little justification for punishing the master for willfulness or wantonness of which the agent is alone guilty.' C.T. McCormick, Handbook on the Law of Damages Section 80 at 282 (1935). Also, I seriously question whether the threat of punitive damages would enable the employer to perform the difficult task of predicting or controlling the reckless or malicious conduct of its employees which is generally sporadic."

It is submitted that punitive damages cannot, consistently with the Due Process Clause of the Fourteenth Amendment, be imposed upon a corporation for unauthorized, unratified and in fact forbidden conduct of an agent. This Court, as far back as *The Amiable Nancy*, 16 U.S. (3 Wheaton) 546, 558-59 (1818) announced the rule that an innocent principal could not be held for punitive damages for lawless conduct which it did not direct, contenance or participate in. Justice Story, in so holding, referred to punitive damages as "resting in discretion, and

intended to punish offenders." An innocent principal is not an offender.

The basic notion of fundamental fairness which Due Process embodies requires that punishment based upon a requisite mental state not be imposed upon innocent principals.

The time is ripe for this Court to reassess punitive damages including the imposition thereof on a vicarious liability basis. This case provides both an appropriate opportunity to do so, and points up the great need for this Court to provide guidance in this area.

III. THE AMOUNT OF THE AWARD OF PUNITIVE DAMAGES IN THIS CASE WAS EXCESSIVE, IN VIOLATION OF PACIFIC MUTUAL'S DUE PROCESS RIGHT TO BE FREE OF GROSSLY EXCESSIVE, DISPROPORTIONATE DAMAGES AWARDS

The hospital bill of Mrs. Haslip which was not paid under the lapsed Union Fidelity policy was $2,500. The award in excess of this amount, in excess of $1,000,000, was punitive damages. It is submitted that this award was excessive under Due Process standards.

In *Browning-Ferris Industries Of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. __, 109 S.Ct. 2909 (1989), Justice Brennan, in his concurrence, suggested that Due Process forbids excessive damages in civil cases, stating, at page 2923:

> "Several of our decisions indicate that even where a statute sets a range of possible civil damages that may be awarded to a private litigant, the Due Process Clause forbids damages awards that are 'grossly excessive,' *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909), or 'so severe and oppressive as to be wholly disproportionate to the offense and obviously unreasonable,' *St. Louis, I.M. & S.R. Southwestern Telegraph & Telephone Co. v. Danaher*, 238 U.S. 482, 491 (1915); *Missouri Pacific Railway Co. v. Humes*, 115 U.S. 512, 522-23 (1885). I should think that, if anything, our scrutiny of awards made without the benefit of a legislature's deliberation and guidance would be less indulgent than our consideration of those that fall within statutory limits."

Because punitive damages are punishment sanctions, it is submitted that Due Process further constrains excessive awards.

A number of decisions of this Court have addressed the issue of when nominally civil cases are penal in nature, including *U.S. Ex Rel. Marcus v. Hess*, 317 U.S. 537 (1943); *Trop v. Dulles*, 356 U.S. 86 (1958); and *U.S. v. Halper*, 490 U.S. __, 109 S.Ct. 1892 (1989).

As applied to punitive damages awards, these cases suggest that (i) if the purpose of the sanctions is punishment, certain Fourth, Fifth and Sixth Amendment protections would apply under the Due Process Clause of the Fourteenth Amendment, (ii) no remedial purpose can be found where the amount of the sanctions exceeds the amount which can fairly be determined to be remedial as compensation for actual loss, and (iii) in government actions and *qui tam* actions, under federal statutes, double damages do not constitute punishment where the aggregate amount thereof does not exceed such compensation, broadly viewed.

The general rule regarding whether a punishment sanction is excessive appears to be that punishment must not be grossly out of proportion to the severity of the offense [*Trop v. Dulles*, 356 U.S. 86 (1958); *Gregg v. Georgia*, 428 U.S. 153 (1976)]. In *Solem v. Helm*, 463 U.S. 277 (1983), this Court sought to set some objective criteria for determining whether a sanction was disproportionate.

It is submitted that the excessiveness of the award in this case, and the number of multimillion dollar awards being rendered shows the necessity for this Court to make a broad review of punitive damages doctrine on Due Process grounds, and require that they bear a necessary relationship to actual harm caused.

IV. THE SUIT BELOW, ALTHOUGH NOMINALLY CIVIL, MUST BE CONSIDERED CRIMINAL IN NATURE AS TO THE PUNITIVE DAMAGES AWARDED THEREIN, ENTITLING PACIFIC MUTUAL TO PROTECTION UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. The Controlling Test Established by the United States Supreme Court

In *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), this Court established the test and analytic process to be applied to determine when the full protections guaranteed by the Constitution to criminal defendants must be given to defendants in a nominally civil action. In *Mendoza-Martinez*, a defendant had been denaturalized under Section 401(j) of the Nationality Action of 1940, for leaving and remaining outside of the United States to evade or avoid military service. The court held the statute to be invalid because it deprived the defendant of citizenship, *as punishment*, without the safeguards guaranteed by the Fifth and Sixth Amendments.

In reaching this conclusion, this Court stated, at page 167:

> ". . .[F]orfeiture of citizenship is a penalty for the act of leaving or staying outside the country to avoid the draft. This being so, the Fifth and Sixth Amendments mandate that this punishment cannot be imposed without a prior criminal trial and all its

> incidents, . . . *If the sanction these sections impose is punishment, and it plainly is, the procedural safeguards required as incidents of a criminal prosecution are lacking. We need go no further.*" [Emphasis added.]

The court in *Mendoza-Martinez* thereby flatly stated the position that if a sanction is punishment, the procedural safeguards of the Fifth and Sixth Amendments must be applied.

This appears to be a single, overriding standard for determining the applicability of criminal procedural safeguards under the Fourth, Fifth and Sixth Amendments, and logically, the Eighth Amendment.

The criteria for determining whether or not the sanction is punishment are (i) is the announced purpose to punish, as in *Mendoza-Martinez*, or (ii) if the purpose is unstated or stated to be a civil remedy, do other factors (enumerated in *Mendoza-Martinez*) show that a non-punishment purpose can be assigned which is not overridden by the punishment impact of the sanction?

B. In Alabama, Punitive Damages Are Expressly Imposed for Punishment and Deterrence and Therefore Meet the *Mendoza-Martinez* Test

Punitive damages in Alabama, as a matter of the common law of the state, are authorized in various categories of cases, and may be recovered by a plaintiff to punish the defendant and deter future similar conduct. [*Aetna Life Ins. Co. v. Lavoie*, 470 So.2d 1060 (Ala. 1985); *Badgett* v. *McDonald*, 304 So.2d 228 (Ala.Civ.App. 1974)].

The United States Supreme Court, in *Bell v. Wolfish*, 441 U.S. 520 (1979), stated at page 589, n.20:

"Retribution and deterrence are not legitimate non-punitive governmental objectives."

C. The Fact That Punitive Damages Are Sought in These Cases by Private Plaintiffs, Rather Than the Government, Does Not Prevent the Actions from Being Deemed Criminal in Nature

Plaintiffs in these cases act as private attorneys general in seeking punitive damages, the award of which is not a personal right, but rather, is a public interest in punishment and deterrence [*See, In Re Paris Air Crash*, 622 F.2d 1315, 1319-1320 (9th Cir. 1980), *cert. denied*, 449 U.S. 926 (1980)]. The involvement of the states in imposing punishment through punitive damages is clear. It is submitted that a state cannot evade according constitutional protections in inflicting punishment and retribution by providing that the punishment be imposed by a private attorney general. Therefore, the criminal proceeding protections must be accorded either directly under the Amendments stated above or through the Due Process Clause of the Fourteenth Amendment. See in this regard, *United States Ex. Rel. Marcus* v. *Hess*, 317 U.S. 537 (1943), in which the Court considered whether or not a sanction in a case having a private party plaintiff was in fact a criminal case. While finding that the purpose of the sanction was not punishment, and therefore that the incidents of a criminal trial were not required, the discussion and analysis of the Court assumed that if the purpose were punishment, such incidents would have been required.

In this case, Pacific Mutual was denied a beyond a reasonable doubt burden of proof [*In Re Winship*, 397 U.S. 358, 364 (1970)].

Again, this is an area in which guidance from this Court is needed to establish the procedural safeguards to which defendants are entitled in punitive damages actions.

V. ALABAMA LAW DISCRIMINATES AGAINST THOSE DEFENDANTS SUBJECTED TO OPEN-ENDED PUNITIVE DAMAGES BY LIMITING THE AMOUNT OF SUCH DAMAGES WHICH MAY BE AWARDED AGAINST OTHER CLASSES OF DEFENDANTS, WITHOUT RATIONAL BASIS

Alabama punitive damages law, as it applied to Pacific Mutual in this case, provided for punitive damages in unlimited amount. The jury charge gave no guidance and imposed no limit on the severity of the punishment.

Alabama, however, without a rational basis for the classifications, limits punitive damages to double or treble damages in at least six categories of cases. These classifications are wholly arbitrary, and violate the Equal Protection Clause of the Fourteenth Amendment.

Professor Wheeler in his article "The Constitutional Case for Reforming Punitive Damages," 69 Va.L.Rev. 269 (1983), analyzed this situation as follows as pages 299-300:

> "A fundamental problem with all statutory schemes that limit punitive damages for only selected types of wrongful conduct and allow discretionary punitive damages for all others is that the selective treatment is arbitrary. The whole range of problems, risks and inconsistencies that characterize discretionary punitive damages proceedings inheres in all such proceedings, regardless of the type of tortious conduct that gave rise to the cause of action."

No rational basis is apparent for limiting punitive damages in cases of usury, restraint of trade, deceptive trade practices or various areas of consumer fraud, while leaving Pacific Mutual subject to open-ended punitive damages for Mr. Ruffin's fraud.

In this case, the commercial speech rights of Pacific Mutual are impacted by the imposition of punitive damages liability against it for the unauthorized, unratified fraud by its sales agent. The potential for such liability must inhibit the actual and symbolic speech of companies which must act through representatives, in the selection of representatives and in communications with such representatives.

Further, Pacific Mutual's access to the courts is impacted in such a case, because it cannot defend itself by showing that it acted properly in all respects. The fine is imposed for the "evil intent" of another, acting in a wholly unauthorized and unratified manner, against the interest of Pacific Mutual, and solely for the benefit of himself.

Where fundamental rights such as First Amendment speech rights and Fifth and Fourteenth Amendment rights of access to courts are impacted, as it is submitted they are in these cases through self-censorship resulting from unreasonable risk and unpredictability, equal protection requires more than an apparent rational relationship to a proper state objective [*Police Dept. of Chicago v. Moseley*, 408 U.S. 92, 99 (1972); *Dunn v. Blumstein*, 405 U.S. 330, 342-43 (1972); *Tele-Communications of Key West, Inc. v. United States*, 757 F.2d 1330 (D.C. Cir. 1985)]. Laws with a potential for impingement on such rights must be "tailored" to serve a substantial governmental interest [*Police Dept. of Chicago v. Moseley*, 480 U.S. 92, 99 (1972)]. Punitive damages are not tailored.

VI. THE CONSTITUTIONAL DEFECTS IN THE AWARD OF PUNITIVE DAMAGES AGAINST PACIFIC MUTUAL IN THIS CASE WERE NOT CURED BY JUDICIAL REVIEW AND THE POTENTIAL FOR A REMITTITUR

The Alabama Supreme Court stated at page 11 of its opinion [App., *infra*, B13] that review of the punitive damages award by the trial court under the procedures established in

Hammond v. City of Gadsden, 493 So.2d 1370 (Ala. 1986) further established that the Due Process Clause had not been violated.

In *Hammond*, the Alabama Supreme Court established seven factors to be considered by the trial court in reviewing a challenged award of punitive damages. They are:

> (i) whether there is a reasonable relationship between the punitive damages and the harm done by the defendant;
>
> (ii) the reprehensibility of defendant's conduct;
>
> (iii) the profit to defendant from such conduct;
>
> (iv) the wealth of the defendant;
>
> (v) the costs of litigation;
>
> (vi) whether criminal sanctions have been imposed; and
>
> (vii) whether other civil awards have been made against defendant for the same conduct.

These factors are largely unreviewable, and merely transfer discretion to the reviewing court. For example, the "reasonable relationship" test has proved to be meaningless because virtually any ratio of punitive to actual damages can be and has been held to be "reasonable." These factors amount to no more than the "gentle test of excessiveness," particularly given the extraordinary deference given to the jury decisions in these cases. At most, use of the language of these criteria merely disguise the true bases of the court's decisions, which are subjective value judgments.

Justice Maddox, in his dissent below [App., *infra*, B16] stated his view of these criteria as follows:

> "While I applaud the procedure this Court has adopted to review and revise the jury's decision based upon its 'standardless discretion,' I cannot believe that procedure is sufficient to accord to litigants all the due process protection the Constitution envisions." [Footnote omitted.]

It is submitted that judicial review does not and cannot cure the constitutional defects in the punitive damages award in this case. A procedure for review of a decision made under an unconstitutional law does not and cannot cure the unconstitutionality of the law. [*See Furman v. Georgia*, 408 U.S. 238 (1972); *cf. Greenbelt Coop. Publishing Assn. v. Bresler*, 398 U.S. 6, 7-11 (1970).]

In Alabama, as in most states, extraordinary deference is given to the jury's decision as to punitive damages, and a jury punitive damage award will only be disturbed if it is, in the judgment of the reviewing court, so excessive as to show that it must have been the product of bias, passion, prejudice, corruption or other improper motive.

This standard of review leaves such a broad field for unfettered jury discretion that it cannot cure underlying defects.

Unlike the appellate review process in criminal matters, in punitive damages cases the appellate process itself lacks clear and consistent standards. This fact creates a risk of its own rather than curing the constitutional deficiencies found at the trial stage. In *2-D's Logging, Inc. v. Weyerhauser Co.*, 632 P.2d 1319 (Or. 1981), the appellate court made note of this problem, stating at page 1326:

> "Punitive damages doctrines have resulted in a perplexing and contorted mode of judicial review . . . which, in reality, is an imprecise pattern of subjective judicial reactions mixed with some episodes of deference to jury verdicts. . . . At least in cases where there is no specific statutory authorization for their award, the imposition of punitive damages involves a policy or value judgment."

Because the jury was not instructed to adhere to any ascertainable standard or to apply any specified set of factors, it is impossible to determine whether the jury properly applied or ignored any guidelines or set of factors. The award is therefore invalid.

In *Greenbelt Coop. Publishing Assn. v. Bresler*, 398 U.S. 6 (1970), this Court stated the matter as follows, at page 13:

> "For when it is impossible to know, in view of the general verdict returned whether the jury imposed liability on an impermissible ground, the judgment must be reversed and the case remanded." [Citations omitted.]

It is submitted that under the three-part test of procedural Due Process set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976), the provision for remittitur by reviewing trial and appellate courts does not satisfy the requirements of Due Process for adequate limits on jury discretion.

The concern expressed by this Court, that there is a lack of objective standards limiting the jury's imposition of punishment, and juries are left free to render awards without any necessary relationship to actual harm, cannot be met by the generalized, subjective and highly judgmental factors suggested by the Alabama Supreme Court.

CONCLUSION

Punitive damages law, as presently applied, is overwhelmingly lacking in fundamental fairness. The law gives no fair notice of prohibited conduct because of the vague and largely contentless criteria upon which the awards are founded. Juries are sent to deliberate with no meaningful standards to guide them as to the amount of punitive damages awardable. This unbridled discretion leads to arbitrary and unpredictable awards.

Under the jury instructions given in this case, which appear typical, discussed above, the jury was left free

(i) to give free reign to biases and prejudices and to punish selectively;

(ii) to allow others "guilty" of equally "reprehensible" conduct to go unpunished;

(iii) to punish unpopular and target defendants, and;

(iv) to render awards with no necessary relationship to actual harm caused.

Judicial review, in the absence of objective limits on jury discretion, merely transfers discretion to the courts.

The unpredictability of the outcome of any punitive damages case submitted to a trier of fact has led to actions which are *in terrorem* and extortionate in nature.

This situation requires remedy by this Court. It is submitted that Pacific Mutual's Petition should be granted.

February 7, 1990

Respectfully submitted,

Of Counsel:
VICKI W.W. LAI
ADAMS, DUQUE & HAZELTINE

OLLIE L. BLAN, JR.
BERT S. NETTLES
SPAIN, GILLON, GROOMS, BLAN & NETTLES

BRUCE A. BECKMAN
Counsel of Record
ADAMS, DUQUE & HAZELTINE
523 West Sixth Street
Los Angeles, California 90014
(213) 620-1240

J. MARK HART
SPAIN, GILLON, GROOMS, BLAN & NETTLES
2117 Second Avenue North
Birmingham, Alabama 35203
(205) 328-4100

Attorneys for Petitioner
Pacific Mutual Life Insurance Company

APPENDIX A

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

CLEOPATRA HASLIP, et al
Plaintiffs
vs.
PACIFIC MUTUAL LIFE
INSURANCE COMPANY, et al
Defendants

CV82-2453

ORDER

The defendants' motions for judgment notwithstanding the verdicts or in the alternative for a new trial is denied and the jury's verdicts in favor of Cleopatra Haslip, Alma Calhoun, Cynthia Craig, and Eddie Hargrove, is to stand. Essential to this ruling is an outline of the relevant facts and parties followed by discussion of the legal issues raised by the defendants in their motions.

I. FACTS:

In May, 1981 Roosevelt City seeking additional health and life insurance for its employees, responded to a Pacific Mutual advertisement, and contacted Mr. Lemmie Ruffin, an agent of Pacific Mutual Life Insurance Company. The purpose of this meeting was to have issued a group health and life insurance policy for participating employees. Mr. Ruffin presented the city with a Pacific Mutual business card, utilized Pacific Mutual brochures and displayed a Pacific Mutual schedule of benefits, (which also had Union Fidelity's name typed in.) After the discussions, Ruffin issued a group

policy for Roosevelt City, placing life insurance with Pacific Mutual and health insurance with Union Fidelity. The apparent reason for placing the health insurance with Union Fidelity was that Pacific Mutual did not write group health policies for municipalities. Though Mr. Ruffin was an employee for Pacific Mutual, he had additional licenses with other insurance companies, including Union Fidelity. The participating employees paid their premiums by way of payroll deductions and the clerk of Roosevelt City wrote a check periodically to cover the premiums. Mable Poindexter, the Clerk for Roosevelt City, testified that Ruffin spoke only of Pacific Mutual and indicated that Union Fidelity was a subsidiary of Pacific Mutual. On October 1st, unbeknownst to the participating employees, the policies were cancelled for non-payment of premiums, because the cancellation notice from both Union Fidelity and Pacific Mutual were sent to Ruffin who continued to collect premiums from Roosevelt City. Earlier, Mr. Ruffin, with the aid of local Pacific Mutual office manager, Mr. Patrick Lupia, had the cancellation notices sent to him rather than Roosevet [*sic*] City. Consequently, neither Roosevelt City nor its employees were aware that the policies were cancelled and continued to send premium payments to Mr. Ruffin. Only later, when Ms. Cleopatra Haslip was hospitalized, was it discovered that the policies were cancelled.

The individual parties and witnesses are as follows:

A. CLEOPATRA HASLIP

Ms. Haslip first met with Ruffin in August 1981 when he represented himself as a Pacific Mutual agent. Throughout their conversation about health insurance, Ms. Haslip always believed that the insurance policy would be furnished by Pacific Mutual. Beginning

September 1, 1981, Ms. Haslip had her insurance premiums deducted from her paycheck. These premiums were deducted monthly and were effective from August 1981 through January 1982. Ms. Haslip only became aware of her lack of insurance when she entered the hospital on or about January 24, 1982. After incurring $2500 in hospital debts and believing she was covered by Pacific Mutual Insurance Company, she was shocked to discover that her policy had been cancelled — especially since she had never asked Ruffin to cancel it. Although Ms. Haslip had paid premiums from August 1981 to January 1982, in actuality she and the other plaintiffs only had health insurance coverage for one month (September 1981) and life insurance for two months (October and November 1981).

While Ms. Haslip and the other plaintiffs had no knowledge that their insurance had been cancelled, Lemmie Ruffin knew of the cancellation, yet he continued to have the premium payments sent to him. In September, 1981 Ruffin collected the first month's premium check (which was made payable to Union Fidelity). The plaintiffs were covered their first month; however, beginning October 1, 1981 the premiums were made payable to Ruffin who continued to collect the premiums. These payments were drawn on Roosevelt City checks and were paid as follows: On August 26 a check for $430.02 was made payable to Union Fidelity, then two checks which were later voided were written and on September 4 a check was written to Pacific Mutual in the amount of $149.16. On September 8 another check was made payable to Pacific Mutual for $71.45. October 20 a check for $105.90 was made payable to Lemmie Ruffin. On November 6 a check for $268.68 was made payable to Lemmie Ruffin. December 11 a check for $76.90 was made payable to Lemmie Ruffin and then again, a check for $268.68 was made

payable to Lemmie Ruffin on January 15. It is important to note that at all times, Lemmie Ruffin collected the premiums from Roosevelt City.

B. ALMA CALHOUN

Ms. Calhoun, the Sight Manager for the Elderly Program for Roosevelt City, also discussed an insurance program with Ruffin. Ruffin presented Ms. Calhoun with Pacific Mutual brochures and a Pacific Mutual business card. Ms. Calhoun filled out one application for a package deal of health and life insurance, believing this policy was with Pacific Mutual. She denies knowing anything about Union Fidelity and did not receive a lapse notice on her insurance policy. Like Ms. Haslip, Ms. Calhoun paid her premiums monthly and only learned of the cancellation after news of Ms. Haslip's cancellation.

C. CYNTHIA CRAIG

Ms. Craig, a teacher's aide with Roosevelt City, also paid premiums from August 1981 through January of 1982. Her discussions with Ruffin led her to believe that her health insurance was covered by Pacific Mutual. She also was given no lapse notice, nor was Ms. Craig told that her health insurance had been cancelled.

D. EDDIE HARGROVE

Mr. Hargrove was an employee in the Street Department of Roosevelt City. He recalls discussing a "group plan" insurance coverage with Ruffin, but decided to purchase only life insurance from Ruffin and Pacific Mutual. Mr. Hargrove paid premiums for life insurance

from September through January of 1982. As is the case with the other plaintiffs, he received no lapse notice nor notice of cancellation.

E. MABEL POINDEXTER

Mabel Poindexter is the Clerk for Roosevelt City who wrote the premium checks to Mr. Ruffin. When, at first, Ruffin asked her to make the checks payable to Union Fidelity, she acquiesced upon his assurances that Pacific Mutual was Union Fidelity's parent company. Ms. Poindexter never took out health insurance, nor did she receive a lapse notice from Pacific Mutual. Ms. Poindexter only learned of the cancellation when Ms. Haslip contacted her, at which point Mr. Ruffin brought the claim form to the city, (which turned out to be invalid numbers). Ms. Poindexter then gave the claim forms to Ms. Haslip's daughter who brought them to the hospital.

F. DEBORAH AULT

Deborah Ault worked in a secretarial capacity for Pacific Mutual, answering phones, receiving mail, typing for agents and doing personal typing for Mr. Lupia. She testified that she had seen insurance premium checks made out to Lemmie Ruffin and she informed Mr. Lupia of this news. She also recounted telephone calls from customers complaining about receiving premium notices for premiums which they had already paid.

G. RALPH PASSMAN

In his deposition, Ralph Passman stated that his health insurance policy began September 1 and was terminated for non-payment of premiums on September 30, 1981,

that his termination notice was sent to Mr. Patrick Lupia, at Mr. Lupia's request, and further that another termination notice was sent to Mr. Lemmie Ruffin. He also stated that no other premiums were received for the health insurance and that the cancellation notices sent to Mr. Lupia and Mr. Ruffin were the only ones sent out. In other words, the plaintiffs never received notice of cancellation.

H. FRANK JOHNSON

Mr. Frank Johnson is a training director of Debit Life Insurance Company, Protective Industrial Insurance Company. Investigating a problem for a client's mother, Lennie B. Spencer, he discover [*sic*] that Mrs. Spencer had been paying on a life insurance policy that did not exist. Payments were made in the fall and winter of 1981 and 1982 and her agent was Lemmie Ruffin.

I. LIONEL WILLIAMS

Mr. Williams, a grocery store owner was also looking for group health insurance for his employees and spoke with Mr. Ruffin, as well. Mr. Williams testified that he also was paying for insurance that he later discovered did not exist. He recalled speaking with Mr. Lupia, calling the main office of Pacific Mutual in California, and then being referred locally. He was never satisfied with his insurance, never had the medical bills paid, and as a result, he lost an employee.

II. LEGAL ISSUES

A. CAN A PRINCIPAL BE HELD LIABLE UNDER RESPONDEAT SUPERIOR FOR FRAUD OF AN AGENT?

The Supreme Court of Alabama has repeatedly stated that a corporation is liable for the torts of its employees, both agent and servant, based upon the principal of Respondeat Superior, not the doctrine of agency. "The actual question to be determined is whether the act complained of was done either by agent or servant while acting within the course and scope of his employment; the corporation or principal may be liable in tort for the acts of its servants or agents done within the scope of employment, real or apparent, even though it did not authorize or ratify such acts or even expressly forbade them." *Autrey v. Blue Cross and Blue Shield of Alabama* 481 So.2d 345 (Ala. 1985), *National States Insurance Company v. Jones*, 393 So.2d 1361, 1367 (Alabama 1980) (Quoting from *Old Southern Life Insurance Company v. McConnell*, 52 Ala. App. 296, So.2d 183, 186 (1974). The courts have further held the principal liable for his agent's fraud committed within the actual or apparent scope of his employment, even where the fraud was committed strictly for the agent's own benefit and to the principal's detriment. *Henderson v. Croom*, 403 F.Supp. 668 (1975). As stated in *National States Insurance Company v. Jones*, 393 So.2d 1361, (Ala. 1980), "while the soliciting agent commits fraud, the insurer's liability is vicarious and the principal is liable in spite of the fact that he did not participate in the fraud or even forbade it." *National States Insurance Company v. Jones*, 393 So.2d 1381 (Ala. 1980). *Gulf Electric v. Fried*, 218 Ala. 684, 119 So. 685.

As the above cases illustrate, the bulk of Alabama's law holds that a principal may be held liable in Respondeat Superior for the fraud of its agents. The issue as to whether Ruffin was an agent for Pacific Mutual was properly given to the jury to decide, as was the abandonment of agency issue. (See discussion below.)

B. ABANDONMENT OF AGENCY

Pacific Mutual based its defense on an abandonment of agency theory. The defense argued that Lemmie Ruffin acted on behalf of other principals at the time he committed fraud, thereby abandoning his agency relationship with Pacific Mutual. The defense cited *Hearing Systems, Inc. v. Chandler*, 512 So.2d 84, (Ala. 1987), a hearing aid fraud case where one of the defendants was affiliated with Montgomery Hearing Health Services (MHHS), but was retained as a consultant for hearing systems (HS). In reversing a verdict of fraud, the Court held that defendant acted strictly as a consultant for HS and made no representations on behalf of MHHS. Further, the defendant did not receive any proceeds of the sale to plaintiff. *Hearing Ststems, [sic] Inc. v. Chandler*, 512 So.2d at 88. This case differs from the case at bar, however, and such a verdict reversal is not warranted here.

As stated in *Brown v. Commercial Dispatch Publishing Co.*, 504 So.2d 245 (Ala. 1987), "whether one is an agent of another is ordinarily a question to be decided by jury." Also see *American Pioneer Life Insurance Company v. Sandlan*, 470 So.2d 657 (Alabama 1985). The Court further charged the jury regarding abondonment [*sic*] of agency. The Court clearly stated that "if, in fact, he had abandoned that relationship, the agency principal, the agent's relationship between Pacific Mutual and himself and it was reasonably apparent to everyone that

he was acting on behalf of another, that Pacific Mutual cannot be held responsible for his acts committed as an agent or within the line and scope of employment of someone else, another insurance agency." Trial excerpts 18-20. Having heard these instructions, the jury decided that Lemmie Ruffin had not abandoned his agency relationship with Pacific Mutual. The decision was not erroneous considering the evidence before them. The evidence showed that the plaintiffs believed that they were dealing with Pacific Mutual. For example, Mr. Ruffin presented the city with Pacific Mutual business cards, distributed Pacific Mutual brochures and schedule of benefits, and spoke as a Pacific Mutual representative. Mrs. Haslip was always under the impression that she was covered by Pacific Mutual, as were Alma Calhoun, Cynthia Craig, and Eddie Hargrove. Unlike the defendant in *Hearing Systems, Inc. v. Chandler*, Ruffin made a definite representations [*sic*] that he was an agent with Pacific Mutual.

C. FRAUD OF FUTURE ACTS

In its motion for JNOV, defendant alleges that there was an insufficiency of evidence of material misrepresentation of a presently existing fact to each of the plaintiffs. Where fraud is based upon a promise to perform in the future, two elements in addition to the fraud requirement, must be met: the defendant must have had no intention of doing the promised act when he made the alleged misrepresentation and he must have had an intent to deceive. *Coastal Concrete Co., Inc. v. Patterson*, 503 So.2d 824 (Ala. 1987). In the case at bar, however, the misrepresentation is of an existing fact. When an agent accepts the premium from a client, he is in essence telling the client that there is a presently existing policy. Thus, the agent is representing an

existing fact, not a future act. Courts have held that "payment of a premium is necessary as a condition precedent to an enforceable contract of insurance. *Johnson v. Dairyland Ins. Co.*, Ala. Civ. App. 398 So.2d 317, *Queen Insurance Co. of America v. Bethell Church*, 27 Ala. App. 443, 174, So. 638, cert denied, 234 Ala. 184, 174 So. 640 (1937). The premiums in this case were in fact paid out of the employee's paychecks and were not merely promises to pay. By accepting these premiums, the agent conveyed to the parties that their policies were both present and existing.

Even if this were to involve future acts, the evidence presented would prove that the agent had no intention of fulfilling his promises and that he intended this deception. By accepting premiums on a policy which, unbeknownst to the plaintiffs had been cancelled, the agent exhibited his intentions not to perform his promises.

D. ADMISSIBLE STATEMENTS OF WITNESSES

Deborah Ault was employed by Pacific Mutual in a secretarial capacity, her duties composed of answering the phone, receiving mail, typing for agents and Mr. Lupia and doing proposals. Evidence of her phone conversations with Ruffin's clients was admitted at trial and defendants contend this was inadmissible evidence of prejudicial effect. This evidence was admissible, however, not to prove truthfulness of the matter but to prove Pacific Mutual's *notice* of the problem. *Gamble, McElroy's Alabama Evidence* §273.02 (3rd Edition 1977), states that: if it is material to prove that a person at a specified time had been put on notice about a matter, or entertained a specified belief, acted in good or bad faith, had a specified motive to do or not to do an act with a specified motive . . . and which is offered for the

purpose of showing *notice*, belief, good or bad faith, motive or mental derangement is not violative of "the Hearsay Rule." *Pennsylvania Cas. Co. v. Perdue*, 164 Ala. 508. Ms. Ault's testimony was not admitted to prove Ruffin or Pacific Mutual's faults, but rather to show that Pacific Mutual had received *notice* of customer complaints.

Similarly, the testimony of both Frank Johnson and Lionel Williams was admissible to show a pattern in Mr. Ruffin's actions. On the issue of whether a party did a fradulent act, proof may be made that such party committed similar fraudulent acts against other persons to show fraud, motive, scheme or intent. *Gamble, McElroy's Alabama Evidence*, §70.03 (1) (3rd Edition, 1977).

Both Johnson and Williams testified that each paid Mr. Ruffin for insurance policies which did not actually exist. This evidence simply illustrates a pattern of behavior Mr. Ruffin engaged in. This type of evidence was also admitted in a similar insurance fraud case. In *American Pioneer Life Ins. Co. v. Sandlin*, 470 So.2d 657 (Ala. 1985), the court allowed the testimony of several witnesses who had been sold plans by the agent "to show that representations by an agent as to recovery of principal and accumulation of interest were false so as to prove a fraudulent scheme."

E. ACTUAL MONETARY DAMAGES ARE NOT NECESSARY IN ORDER TO RECOVER PUNITARY DAMAGES

One can recover punitive damages if the evidence proves that the misstatements were made with an intent to deceive or defraud. *Best Plant Food Products, Inc. v. Cagle*, 510 So.2d 229 (Ala. 1987), *Ex parte Lewis*, 416

So.2d 410 (Ala. 1982). Following *Curry Motor Co., Inc. v. Hasty*, 505 So.2d 347 (Ala. 1987), "punitive damages may be recovered in fraud action if fraudulent misrepresentation was malicious, oppressive or gross or made with knowledge of its falseness or so recklessly made as to amount to the same thing or is made with purpose of injuring plaintiff." *Curry Motor Co. Inc. v. Hasty*, 505 So.2d at 351; Code 1975, §6-5-101. The evidence presented in the present trial indeed established that Ruffin knowingly and intentionally committed fraud by collecting insurance premiums on cancelled policies and keeping the premiums for himself. Ruffin intentionally deceived not only Cleopatra Haslip, but also deceived Alma Calhoun, Cynthia Craig and Eddie Hargrove. All of the aforementioned names had premiums deducted from their payroll for five months and only received coverage for one month — the fraud intentionally committed by Ruffin. This element of intent is an important element which entitles the plaintiffs to punitive damages.

Punitive awards are also allowable even where only nominal damages are incurred in fraud cases. However, courts stress the intentional nature of the fraud and have allowed large punitive damage awards where there was evidence of "intentional, gross and oppressive" fraud. *American Pioneer Life Ins. Co. v. Sandlin*, 470 So.2d 657 (Ala. 1985) at 669. So long as the verdict was not so excessive as to be considered the result of a jury with "bias, passion, prejudice or some other improper motive, a very large punitive damage award is not considered excessive, especially when paired with strong evidence of intentional fraud. *Aetna life ins. co. [sic] v. Lavoie*, 470 So.2d 1060 (Ala. 1985) at 1076.

F. JURY CHARGES

In charging the jury on the issue of fraud, the court concedes that it erred in not distinguishing between legal intent (a negligence standard where punitive damages are not recoverable) and fraudulent intent (knows it is untrue when he makes the representation.) It has been a practice of the undersigned to instruct the jury without notes in a conversational manner, rather than reading verbatim from approved charges. Perhaps the phrase "should have known" inadvertently crept into the oral charge because of this practice, for the undersigned is at a loss to understand why the phrase was included. Although the "should have known" language should not have been included, it is unlikely that this misleading language materially confused the jury. Taken together with the evidence, it is the opinion of this court, that the misphrased jury instruction was not of sufficient scale to substantially harm the defendant. Rule 61, *Alabama Rules of Civil Procedure*, *Wilk v. American Medical Association*, 719 F.2d 207 (7th Cir. 1983), *Alabama Farm Bureau Mutual Cas. Ins. Co., Inc. v. Smelley*, 295 Ala. 346, 329 So.2d 54 (1976), *Maslowski v. Beam*, 288 Ala. 254, 259 So.2d 804 (1972).

In light of the above, it is important to stress that Pacific Mutual did not base its defense of this case on whether Lemmie Ruffin committed fraud. Rather, Pacific Mutual focused on an abandonment of agency theory. Pacific Mutual did not defend Ruffin. In fact, Ruffin, a named defendant, did not even show up at trial. Pacific Mutual simply defended its case by attempting to show that Ruffin had abandoned his agency relationship with Pacific Mutual. Again, the court stresses Pacific Mutual did not defend Ruffin on his fraudulent acts. Further, all evidence pointed to the conclusion that Ruffin committed fraud, with malice aforethought.

Ruffin had the cancellation notices sent to him from California, the premiums were still being collected after its cancellation of its policy and Roosevelt City did no [*sic*] know that the policies were cancelled. The conclusion is inescapable that the fraud was intentional, gross, oppressive and malicious.

In consideration of these facts, the jury was not erroneous in finding fraud, the elements of which include: "false representation of a material fact relied upon by a party who is damaged as a proximate result of alleged misrepresentation; [and] if fraud is based upon a promise to perform or abstain from some act in future . . . defendant's intention at time of alleged misrepresentation not to do act promised, coupled with intent to deceive." *Coastal Concrete Co. v. Patterson*, 503 So.2d 824 (Ala. 1987), *Smith v. First Bank of Childersburg*, 501 So.2d 1228. (Ala. Civ. App. 1987). Further, plaintiff may prove defendant's intent to deceive through "circumstantial evidence relating to events occurring after representation was made." *Super Value Stores, Inc. v. Peterson*, 506 So.2d 317 (Ala. 1987).

G. MOTION FOR REMITTITUR

In *Hammond v. The City of Gadsden*, 493 So.2d 1394, the Supreme Court made it incumbent upon the trial judge to spread upon the record his reasons for granting or refusing a remittitur of jury verdicts. The Court cited certain factors to be taken into consideration by the trial court in granting or refusing the remittitur.

As has been stated throughout this Order, it is the opinion of this Court that the conduct in this case evidenced intentional malicious, gross, or oppressive fraud. In addition to the acts of Mr. Ruffin, the testimony draws an inference that Mr. Patrick Lupia, Manager of the local Pacific Mutual office, had notice of past

problems with Mr. Ruffin including, but not limited to, prior acts of fraud, and that he participated in the decision to have the cancellation notice sent to the Pacific Mutual agency rather than to the insured. It goes without saying that it is highly desirable to discourage others, similarly situated from similar conduct.

Although the award is for a great amount of money, it is the considered opinion of this Court that it is not excessive as a matter of law, though this Court would in all likelihood have rendered a lessor amount; nor is the verdict based upon bias, passion, corruption, or other improper motive. The jury seems to fashioned [*sic*] their awards in proportion to the damage done each plaintiff; awarding the most damaged plaintiff, Cleopatra Haslip, the larger award and the least damaged plaintiff, Eddie Hargrove, the least award.

The jury was composed of male and female, white and black and in the opinion of the Court, acted conscientiously throughout the trial.

This Court has heard policy arguments against enriching a particular plaintiff under the guise of punishing a defendant from wrongful conduct. It has been suggested by some that punitive damage awards should not be paid to the plaintiff as competent compensation. This Court will leave to others the resolution of this argument, as it is the present law that punitive damages are payable to the particular wronged plaintiff. Though this result might well be different under the recently enacted law, this Court deems it imperative to follow the law as it existed when the wrong was committed.

As stated in *Hammond*, supra: "We begin by recognizing that the right to a trial by jury is a fundamental, constitutionally guaranteed right, Art. I, § 11, Cost. [*sic*] of 1901, and therefore, that a jury verdict may not be set aside unless the verdict is flawed, thereby losing its constitutional protection. It is only in those cases that a

trial court, pursuant to A.R.Civ.P. 59(f), and this Court, pursuant to Code 1975, § 12-22-71, may interfere with a jury verdict."

As has previously been stated, this Court is not of the opinion that the jury verdict is flawed to the point that it should be disturbed and set aside by this Court.

DONE and ORDERED, this 11 day of December, 1987.

/s/ Charles R. Crowder
Charles R. Crowder, Circuit Judge

APPENDIX B

RELEASED SEP 15 1989
Clerk, Supreme Court of Alabama

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
SPECIAL TERM, 1989

Pacific Mutual Life Insurance Company
87-482 v.
Cleopatra Haslip, et al.
Appeal from Jefferson Circuit Court
(CV-82-2453)

SHORES, JUSTICE.

The defendant, Pacific Mutual Life Insurance Company (hereinafter "Pacific Mutual"), appeals from judgments, entered after a jury trial, in favor of the plaintiffs, Cleopatra Haslip, Cynthia Craig, Alma Calhoun, and Eddie Hargrove.

All four plaintiffs are employees of Roosevelt City (hereinafter the "City"), a small incorporated community in western Jefferson County. As many small communities do, Roosevelt City allowed its employees to purchase a group health insurance policy through the municipality. Originally that policy was issued by Blue Cross-Blue Shield. Some months prior to 1981, however, Blue Cross cancelled the policy when several City employees dropped out of the plan, reducing the number of eligible employees participating in the plan below the minimum number of participants required by Blue Cross to maintain a group policy.

Lemmie Ruffin was a soliciting agent for Pacific Mutual. Ruffin sent a mail solicitation to the City asking if it was interested in discussing insurance. The City returned a card indicating that it was.

Ruffin first met with the mayor of the City, who gave him permission to solicit business from the City's employees. Before approaching the employees, Ruffin sought information about the employees from the city clerk, Mabel Poindexter. As he was later to do with the plaintiffs, Ruffin approached Mrs. Poindexter, telling her that he was "with Pacific Mutual." He handed her a Pacific Mutual business card, and he explained that he had been told that the City employees needed hospital coverage. Testimony indicates that Ruffin never told Mrs. Poindexter or the plaintiffs that Pacific Mutual would not write health insurance.

In truth, while Pacific Mutual would issue individual life policies, it did not write group health policies for municipalities. Pacific Mutual did, however, allow its agents to broker business with other insurance companies, and Ruffin was a licensed agent of Union Fidelity Life Insurance Company (hereinafter "Union Fidelity"), which did issue group health insurance through municipalities. Accordingly, Ruffin submitted a proposal to the City on a Pacific Mutual letterhead; that proposal indicated that he would place life insurance with Pacific Mutual and health insurance with Union Fidelity. While Union Fidelity and Pacific Mutual are separate and distinct companies and have no affiliation, Ruffin, when asked by Mrs. Poindexter, indicated that Union Fidelity was a subsidiary of Pacific Mutual.

Employees who opted to participate in the insurance plan paid their premiums by way of payroll deduction. Periodically, Mrs. Poindexter collected the money deducted from these employees' paychecks and wrote one check each month to cover the insurance premiums. These checks were sent to, or were picked up by, Ruffin, who prepared the billing each month on a Pacific Mutual letterhead. Within a few months of the effective date of the insurance policies, they were cancelled for

nonpayment of premiums. Neither the City nor its employees were made aware that the policies had lapsed, because unknown to the City, Mr. Ruffin, with the help of Pacific Mutual's Birmingham manager, Patrick Lupia, had had all correspondence between the insurers and the City employees funnelled through Lupia's Birmingham Pacific Mutual office. In effect, the employees had been paying Ruffin, but their payments had not been forwarded to the insurers.

During this time, in January 1982, Cleopatra Haslip, a participating member of the health insurance plan, entered a hospital. After incurring $2,500 in hospital bills and additional medical bills, she learned that her insurance had been cancelled. The hospital demanded $600 before it would agree to discharge her, and her doctor eventually turned her case over to a collection agency. In time, a deficiency judgment was rendered against Mrs. Haslip, and, as a result, her credit was adversely affected.

Mrs. Haslip and other members of the insurance plan sued Pacific Mutual and Lemmie Ruffin. The case was submitted to the jury on the plaintiffs' claim of fraud; on August 7, 1987, the jury rendered a verdict in favor of each of the plaintiffs in the following amounts: Cleopatra Haslip — $1,040,000; Cynthia Craig — $12,400; Alma Calhoun — $15,290; Eddie Hargrove — $10,288.

Pacific Mutual timely filed motions for a new trial, or alternatively, a judgment notwithstanding the verdict. The motions were denied by the trial court. Pacific Mutual appeals from the judgment based on the verdict; Lemmie Ruffin has not appealed.

Pacific Mutual raises eleven issues on appeal. To facilitate our discussion, we address in the first section several interrelated issues raised by Pacific Mutual.

I.

The first issue that Pacific Mutual presents is whether the trial court erred in charging the jury. Pacific Mutual suggests three ways in which it says the jury charge was flawed: that the trial court charged the jury on an incorrect standard for awarding punitive damages for fraud; that the trial court improperly charged the jury on the standard for awarding damages for mental distress for fraud; and that the trial court erred in refusing to give Pacific Mutual's requested charge regarding justifiable reliance. We address each of these alleged errors in turn.

In charging the jury, the trial judge indicated that the jury could impose liability for fraud if it determined that defendant Ruffin knew that his representations to the plaintiffs were false or *should have known* that his representations were false:

> "[The Court:] The defendant must have known at the time he made the representation that that fact was not true or he *should have known* that it was not true.
>
> ". . . .
>
> "That is the Defendant represents a certain fact to be true, when in fact that fact is untrue. The Defendant making that representation knows it is untrue when he makes the representation or he *should have known* it was untrue." (Emphasis added.)

The latter phrase, "should have known it was untrue," Pacific Mutual contends, suggests negligence, which constitutes only "legal fraud": a misrepresentation made innocently or by mistake, for which punitive damages are not recoverable. Code 1975, § 6-5-101. *Continental Volkswagen, Inc. v. Soutullo*, 54 Ala. App. 410, 309 So.

2d 119 (1975). In contrast, a cause of action for deceit or willful fraud, for which punitive damages are recoverable, requires proof that the defendant knew his representation was untrue at the time he made that representation or that he made the representation with reckless disregard for the truth. Code 1975, § 6-5-103. Because punitive damages are not recoverable for "legal fraud," Pacific Mutual argues that the failure of the trial court to distinguish in its jury charge between willful fraud and legal fraud impermissibly allowed the jury to impose punitive damages for mere legal fraud. We disagree.

In his written opinion, the trial judge conceded that he had erred in charging the jury on the issue of fraud by not distinguishing between misrepresentation and fraud. Moreover, the trial court admitted that the phrase "should have known" had crept into the charges inadvertently. Nevertheless, we can not say that under the facts of this case the misphrased jury instruction substantially harmed the defendant.

The evidence submitted at trial indicated that Lemmie Ruffin forged signatures on applications in order to obtain a minimum number of applicants to meet Union Fidelity's membership requirements for establishing a group insurance plan; that the plan was cancelled within a few months of its inception for nonpayment of premiums, event though participants in the plan had made their premium payments to Lemmie Ruffin; that Lemmie Ruffin continued to accept premium payments after notice of cancellation of the insurance plan had been received by his office; that premium payments collected by Lemmie Ruffin were deposited into his own account; and that Ruffin deposited funds refunded to participants by Union Fidelity into his wife's personal savings account. Given these facts, it is impossible for this Court to entertain the suggestion that the jury could

have been confused or that it could have concluded that Ruffin's representations were made either innocently or mistakenly. We, therefore, affirm the trial court's conclusion that if, in the context of these facts, the charge was erroneous, then the erroneous charge can only be characterized as harmless error. As the trial judge stated his his opinion:

> "Although the 'should have known' language should not have been included, it is unlikely that this misleading language materially confused the jury. Taken together with the evidence, it is the opinion of this court that the misphrased jury instruction was not of sufficient scale to substantially harm the defendant. [Citations omitted.]
>
> ". . . .
>
> "[Given these facts,] [t]he conclusion is inescapable that the fraud was intentional, gross, oppressive and malicious."

Next, Pacific Mutual argues that the trial court erred in charging the jury on awarding damages for mental distress for fraud. Again, damages for mental distress may not be awarded unless the fraud was willful. *Holcombe v. Whitaker*, 294 Ala. 430, 318 So. 2d 289 (1975). As we have previously stated, when one considers the evidence presented at trial, he can reach but one reasonable conclusion: if fraud existed in this case, that fraud must have been willful. Thus, we will not reverse the judgment case based upon the trial court's failure to distinguish willful from nonwillful fraud.

The third alleged error in the instructions to the jury was the judge's refusal to give a charge regarding justifiable reliance. After careful scrutiny of the record, and in particular the trial judge's charge to the jury, we

find no basis upon which we may reverse the judgment in this case because of the judge's refusal of this charge.

II.

The next issue Pacific Mutual presents is whether the trial court erred in failing to grant its motions for directed verdict and judgment notwithstanding the verdict. Pacific Mutual argues that these motions were due to be granted because, it says, 1) Ruffin was not acting within the scope of his agency with Pacific Mutual in placing or maintaining health insurance on the City employees, 2) Ruffin's acts are not imputable to Pacific Mutual, and 3) the evidence presented at trial failed to prove the elements of an action for misrepresentation on the part of Pacific Mutual. We disagree with all three of Pacific Mutual's arguments.

Because the trial court accurately addresses the state of the law regarding the doctrine of respondeat superior in Alabama, we quote at length from the trial judge's opinion:

> "The Supreme Court of Alabama has repeatedly stated that a corporation is liable for the torts of its employees, both agent, and servant, based upon the principle of respondeat superior, not the doctrine of agency. 'The factual question to be determined is whether the act complained of was done either by agent or servant while acting within the course and scope of his employment; the corporation or principal may be liable in tort for the acts of its servants or agents done within the scope of employment, real or apparent, even though it did not authorize or ratify such acts or even expressly forbade them.' *Autry v. Blue Cross & Blue Shield of Alabama*, 481 So. 2d 345,

347-48 (Ala. 1985), *National States Ins. Co. v. Jones*, 392 So. 2d 1361, 1367 (Ala. 1980) (quoting from *Old Southern Life Ins. Co. v. McConnell*, 52 Ala. App. 589, 296 So. 2d 183, 186 (1974)). The courts have further held the principal liable for this agent's fraud committed within the actual or apparent scope of his employment, even where the fraud was committed strictly for the agent's own benefit and to the principal's detriment. *Henderson v. Croom*, 403 F. Supp. 668 (1975). . . .

"As the above cases illustrate, the bulk of Alabama's law holds that a principal may be held liable in respondeat superior for the fraud of its agents. The issue as to whether Ruffin was an agent for Pacific Mutual was properly given to the jury to decide, as was the abandonment-of-agency issue."

Pacific Mutual primarily based its defense of this case on an "abandonment of agency" theory. The defense argued that Ruffin was acting on behalf of other principals at the time he committed fraud, thereby abandoning his agency relationship with Pacific Mutual.

As the trial court pointed out above, whether one is an agent of another is generally a question to be decided by the jury. *Brown v. Commercial Dispatch Pub. Co.*, 504 So. 2d 245, 246 (Ala. 1987). Accord, *American Pioneer Life Ins. Co. v. Sandlin*, 470 So. 2d 657 (Ala. 1985). In *American Pioneer*, the agent, McWhorter, was not a registered agent for American Pioneer when he sold an annuity to the plaintiff, although he became one several months later. Because the evidence pertaining to McWhorter's status as an agent of American Pioneer was conflicting, this Court deemed it a proper question for the jury.

In this case there is no question that sufficient evidence existed to support the jury's determination that Lemmie Ruffin and his agency manager, Patrick Lupia, were acting within the line and scope of their employment with Pacific Mutual when Ruffin made the representations to the plaintiffs that became the subject of this suit: Ruffin was a Pacific Mutual agent and an employee of the company; Lupia was the agency manager; Ruffin's licensing was maintained by the Pacific Mutual office; Ruffin was furnished training and sales material by Pacific Mutual; Ruffin always introduced himself as "Lemmie Ruffin with Pacific Mutual"; Ruffin's reply card was mailed from, and was returned to, the Pacific Mutual office; Ruffin presented City employees with his Pacific Mutual business card; Ruffin never told anyone that the health insurance would be placed with a company other than Pacific Mutual; Ruffin's proposal was typed at Pacific Mutual's office on Pacific Mutual stationery; the monthly billing statements for premiums were prepared at, and mailed from, Pacific Mutual office on Pacific Mutual stationery; Lupia handled all the finances and "the books" for the Pacific Mutual office; all of Lupia's business and all of Ruffin's business was carried on at Pacific Mutual offices; Lupia had received complaints from policy-holders alleging that Ruffin was engaging in fraudulent activities but he had done nothing about those complaints; Pacific Mutual's home office had received complaints regarding Ruffin's fraudulent activities but had done nothing about them.

This evidence was properly submitted to the jury, which found that Lemmie Ruffin had not abandoned his agency relationship with Pacific Mutual, and that he had not acted alone. The jury rendered a verdict based upon sufficient evidence. For the foregoing reasons, we can not find that Ruffin was acting outside the scope of his

agency or that his acts were not imputable to Pacific Mutual.

Moreover, we can not say, given the evidence submitted to the jury, that the plaintiffs failed to prove the elements of an action for misrepresentation. Pacific Mutual claims that the plaintiffs failed to adduce evidence supporting a claim for fraud because, it says, there was no misrepresentation of a material existing fact, no justifiable reliance upon any misrepresentations, and no actual damage to the plaintiffs. This statement simply ignores the evidence presented at trial. When Lemmie Ruffin accepted the premium payments from his clients, the plaintiffs, he was in essence telling those clients that there was an existing policy in effect. Thus, Ruffin was misrepresenting an existing fact. Courts have held that "payment of a premium is necessary as a condition precedent to an enforceable contract of insurance." *Johnson v. Dairyland Ins. Co.*, 398 So. 2d 317 (Ala. Civ. App. 1981), *Queen Ins. Co. of America v. Bethell Chapel*, 27 Ala. App. 443, 174 So. 638, cert. denied, 234 Ala. 184, 174 So. 640 (1937). The premiums in this case were in fact paid out of the employees' paychecks and were not merely promises to pay. By accepting these premiums, Ruffin represented to the parties that their policies were both existing and current. The evidence presented proves that Ruffin had no intention of fulfilling his promises and that he intended his deception. By accepting premiums on a policy which, unknown to the plaintiffs, had been cancelled, Ruffin exhibited his intentions not to perform his promises. We therefore reject Pacific Mutual's claim that the evidence did not prove the elements of an action for fraud.

III.

Pacific Mutual next argues that the trial was tainted by the admission of illegal evidence. At trial, the testimony of a number of witnesses was admitted despite the objections of Pacific Mutual. First, the testimony of Debra [*sic*] Ault, a former secretary, regarding telephone calls from unnamed persons complaining about Ruffin, was admitted over objection that the proper foundation had not been laid for the testimony. Pacific Mutual argues that this evidence was prejudicial, because it was offered as evidence of other frauds perpetrated by Lemmie Ruffin. Moreover, Ault's testimony, Pacific Mutual claims, was improper because, although the rule had been invoked, Ault was allowed to remain in the courtroom during other witnesses' testimony.

C. Gamble, *McElroy's Alabama Evidence* § 273.02 (3d ed. 1977) states:

> "If it is material to prove that a person at a specified time had been put on notice about a matter . . . proof that a statement was made to him prior to the time in question . . . and which is offered for the purpose of showing . . . notice, . . . is not violative of the Hearsay Rule."

Pacific Mutual employed Ault as a secretary. Her duties consisted of, among other things, answering the telephone. The trial court admitted evidence of her conversations with Ruffin's clients, not to prove the truthfulness of the matter asserted, but rather to prove Pacific Mutual's notice of the fraud. Lupia denied any such complaints. Ault's testimony showed that Pacific Mutual had received notice of customer complaints concerning Ruffin; therefore, the trial court's admission

of Ault's testimony did not improperly prejudice the trial.

Pacific Mutual also complains of the trial court's admission of the testimony of Cleopatra Haslip, one of the plaintiffs; that of Ralph Passman, an insurance broker who handled the Union Fidelity insurance plan and who maintained records concerning the cancellation of that policy; and that of Ron Gaiser, an expert witness for the plaintiffs. After a careful review of the trial court's rulings in regard to each, we can not say that Pacific Mutual was materially prejudiced by the admission of this evidence.

IV.

Finally, Pacific Mutual argues that the punitive damages award in this case violates its rights embodied in the first, fourth, fifth, sixth, eighth, and fourteenth amendments to the United States Constitution.

Initially we point out that the United States Supreme Court has recently ruled in the case of *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, __ U.S. __, 109 S.Ct. 2909 (1989), that the excessive fines clause of the eighth amendment does not apply to punitive damages awards in cases between private parties. Moreover, in a series of recent cases, this Court has rejected the remaining constitutional arguments submitted by Pacific Mutual. *See, Industrial Chemical & Fiberglass Corp. v. Chandler*, [Ms. 86-381, Ms., 86-385, Sept. 30, 1968, after remand, June 16, 1989] __ So. 2d __ (Ala. 1988); *United American Ins. Co. v Brumley*, 542 So. 2d 1231 (Ala. 1989); *HealthAmerica v. Menton*, [Ms. 87-1100, July 21] __ So. 2d __ (Ala. 1989); *Olympia Spa v. Johnson*, [Ms. 87-110, May 12, 1989] __ So. 2d __ (Ala. 1989).

We also note that, in an abundance of concern for the preservation and protection of a defendant's constitutional right to due process of law, this Court has adopted guidelines to be used by the trial court in reviewing judgments. These guidelines are found in *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986); *Harmon v. Motors Insurance Corp.*, 493 So. 2d 1370 (Ala. 1986); *Alabama Farm Bureau Mutual Cas. Ins. Co. v. Griffin*, 493 So. 2d 1379 (Ala. 1986). They require the trial judge to reflect on the record his or her reasons for either interfering or not interfering with a jury's verdict.

In reviewing the punitive damages award in this case, the trial judge applied the principles of law adopted in these cases, held a hearing, and set out on the record the reasons why he felt the law did not authorize him to order a remittitur. The facts in the record support the trial court's findings. Further, jury verdicts are presumed correct, and that presumption is strengthened when the presiding judge refuses to grant a new trial. *Super Valu Stores, Inc. v. Peterson*, 506 So. 2d 317 (Ala. 1987). In view of the record, we conclude that the judgment of the trial court, including the damages award, which the trial court reviewed on motion for new trial, is due to be, and it hereby is, affirmed.

AFFIRMED.

Jones, Almon, Adams, and Kennedy, J.J., concur.

Houston, J. concurs in the result.

Maddox and Steagall, J.J., concur in part and dissent in part.

87-482

Pacific Mutual Life Ins. Co. v. Cleopatra Haslip, et al.
MADDOX, JUSTICE (concurring, in part; dissenting, in part).

I concur in the majority opinion in all respects except as to that aspect of the opinion that holds that the punitive damages award in this case does not violate the due process clause of the Fourteenth Amendment to the United States Constitution.

While I personally agree with Justice O'Connor that the "excessive fines clause" of the Eighth Amendment should be applicable in civil cases,[1] I recognize that the Supreme Court of the United States, in *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, __ U.S. __, 109 S.Ct. 2909 (1989), has held otherwise. I think that the United States Supreme Court, in *Kelco*, while holding that the excessive fines clause of the Eighth Amendment is inapplicable to a punitive damages award in a civil case,[2] nevertheless left the door open for a challenge under the federal constitution's due process clause. In fact, in *Kelco*, all nine Justices expressed some concern with unrestrained punitive damages awards, and as I read *Kelco*, the Court may consider a challenge to an award that is properly presented and argued under the due process clause of the Fourteenth

[1] See my dissenting opinion in *Industrial Chemical & Fiberglass Corp. v. Chandler*, [Ms. 86-381 & 86-385, September 30, 1988, after remand, January 16, 1989] __ So. 2d __ (Ala. 1988).

[2] The Court's majority opinion, written by Justice Blackmun, said that the Eighth Amendment's excessive fines clause did not apply to punitive damages awards in civil suits between private parties, because "the primary focus of the Eighth Amendment was the potential for governmental abuse of its 'prosecutorial' power, not concern with the extent or purposes of civil damages." __ U.S. at __, 109 S.Ct. at 2915.

Amendment.[3]

During the last few years, individual Justices of the Supreme Court of the United States have expressed concern about "windfall recoveries which may be both unpredictable and, at times, substantial";[4] "juries [that] assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused";[5] and awards based upon a jury's "wholly standardless discretion to determine the severity of punishment."[6]

In *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986), a case which was appealed from this Court, the Court noted that the argument "that the lack of sufficient standards governing punitive damages awards in Alabama violates the Due Process Clause of the Fourteenth Amendment" raised important issues that "in

[3] In *Kelco*, the Court found that the due process issue had not been sufficiently raised for the Court to consider it, but the Court did not: "[W]e have never addressed the precise question presented here: whether due process acts as a check on undue jury discretion to award punitive damages in the absence of any express statutory limit. . . . That inquiry must await another day." __ U.S. at __, 109 S.Ct. at 2921. Justice Blackmun stated: "There is some authority in our opinions for the view that the Due Process Clause places outer limits on the size of a civil damages award." *id.*

In *Kelco*, in a separate concurring opinion in which Justice Marshall joined, Justice Brennan suggested that the due process issue could be raised: "I join the Court's opinion on the understanding that it leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private parties." __ U.S. at __, 109 S.Ct. at 2923.

[4] *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270-71 (1981).

[5] *Gertz v. Welch*, 418 U.S. 323, 350 (1974).

[6] *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, __, 108 S.Ct. 1645, 1656 (1988) (O'Connor, J., concurring in part and concurring in the judgment).

an appropriate setting, must be resolved." 475 U.S. at 837.

While the view I expressed in my dissent in *Industrial Chemical & Fiberglass Corp.* was not sustained in *Kelco*, I take heart that ultimately, when the due process issue is properly presented to the United States Supreme Court, that Court will hold that giving a jury a "standardless discretion" to award punitive damages in a civil case violates the due process clause of the Fourteenth Amendment.

While I applaud the procedure this Court has adopted to review and revise the jury's decision based on its "standardless discretion,"[7] I cannot believe that procedure is sufficient to accord to litigants all the due process protection the Constitution envisions.[8]

Because I believe that the award of punitive damages in this case violates the defendant's due process rights under the Fourteenth Amendment, I must respectfully dissent as to that portion of the majority's opinion.

Steagall, J., concurs.

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[7] *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986); *Harmon v. Motors Ins. Corp.*, 493 So. 2d 1370 (Ala. 1986); *Alabama Farm Bureau Mut. Cas. Ins. Co. v. Griffin*, 493 So. 2d 1379 (Ala. 1986).

[8] In various special concurrences and dissents, I have expressed the view that punitive damages awarded in wrongful death cases are in a different category from punitive damages awarded in other cases. See *Alabama Power Co. v. Cantrell*, 507 So. 2d 1295, 1306 (Ala. 1986), appeal dismissed, __ U.S. __, 108 S.Ct. 2008 (1988); *Industrial Chemical*, supra.

The Legislature, in placing a "cap" on the award of punitive damages in all cases other than wrongful death cases (except, of course, the $1,000,000 cap in the Medical Liability Act) has essentially recognized the distinction that I have made and do make.

APPENDIX C

MAILING ADDRESS:
P.O. BOX 157
MONTGOMERY, ALABAMA 36101
TELEPHONE: 261-4609

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

Re: 87-482

Pacific Mutual Life Insurance Company
Appellant
vs.
Cleopatra Haslip, et al.
Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

_____ Appeal docketed. Future correspondence should refer to the above number.
_____ Court Reporter granted additional time to file reporter's transcript to and including
_____ Clerk/Register granted additional time to file clerk's record/record on appeal to and including
_____ Appell___ granted 7 additional days to file briefs to and including
_____ Appellant(s) granted 7 additional days to file reply briefs to and including
_____ Record on Appeal filed

_____ Appendix Filed
_____ Submitted on Briefs
_____ Petition for Writ of Certiorari denied. No opinion.
XXXX Application for rehearing overruled. No opinion written on rehearing.
_____ Permission to file amicus curiae briefs granted
_____

11/9/89
bsa

/s/ Robert G. Esdale
Robert G. Esdale, Clerk
Supreme Court of Alabama

APPENDIX D

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT
IN THE SUPREME COURT OF ALABAMA
DECEMBER 6, 1989

87-482
Pacific Mutual Life Insurance Company
v.
Cleopatra Haslip, et al.

Jefferson County Circuit Court
CV-82-2453

ORDER

The application for stay of judgment pending petition for writ of certiorari to the United States Supreme Court having been filed and duly submitted to the Court,

IT IS ORDERED that the application for stay of judgment pending petition for writ of certiorari to the United States Supreme Court is denied.

Hornsby, C.J., and Maddox, Jones, Almon, Shores, Adams, Houston, Steagall, and Kennedy, J.J., concur.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.
Witness my hand this 6th day of Dec. 1989.

/s/ Robert G. Esdale
Clerk, Supreme Court of Alabama

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-452
Pacific Mutual Life Insurance Company,
Applicant,
v.
Cleopatra Haslip, et al.

ORDER

UPON CONSIDERATION of the application for stay and the response filed thereto,

IT IS ORDERED that execution of the judgment of the Supreme Court of Alabama in the above-entitled matter, case No. 87-482, filed September 15, 1989, be and the same is hereby stayed pending referral of the application to the Court for consideration at the Conference on Friday, January 5, 1990.

This order is further conditioned upon the supersedeas bond currently posted with the Circuit Court of Alabama, Jefferson County, Civil Action No. CV 82 2453, remaining in effect.

IT IS FURTHER ORDERED that this stay shall continue pending further order of the Court or of the undersigned.

/s/ Anthony M. Kennedy
Associate Justice of the Supreme
Court of the United States

Dated this 22nd day of December, 1989.

A true copy JOSEPH F. SPANIOL, JR.
Tests
Clerk of the Supreme Court of the United States
By /s/ Francis J. Corsan
Chief Deputy

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

JOSEPH F. SPANIOL, JR.,
CLERK OF THE COURT

AREA CODE 202
479-3011

January 8, 1990

Mr. Bruce A. Beckman
Adams, Duque & Hazeltine
523 West Sixth Street
Los Angeles, CA 90014

RE: Pacific Mutual Life Insurance Company
v. Cleopatra Haslip, et al.
No. A-452

Dear Mr. Beckman:

The Court today entered the following order in the above-entitled case:

> "The application for stay presented to Justice Kennedy and by him referred to the Court is granted and it is ordered that execution and enforcement of the judgment of the Supreme Court of Alabama, case No. 87-482, is stayed pending the timely filing and disposition of a petition for a writ of certiorari. In the event the petition for a writ of certiorari is denied, this order terminates automatically. Should the petition for a writ of certiorari be granted, this order is to remain in effect pending the issuance of the mandate of this Court. This order is further conditioned upon the supersedeas bond presently posted with the Clerk of the Circuit

> Court of Jefferson County, Alabama, Civil Action No. CV 82 2453, remaining in effect."

Very truly yours,

JOSEPH F. SPANIOL, JR., Clerk

By /s/ Francis J. Lorson

Francis J. Lorson
Chief Deputy Clerk

ed
cc: Bruce J. Ennis
Clerk, Supreme Court of Alabama
(Your No. 87-482)
Clerk, Circuit Court of Alabama,
Jefferson County (Your No. CV 82 2453)